

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF DENTISTRY**

In the Matter of the Adopted Rules of the Minnesota Board of Dentistry Relating to Licensure and Practice in Dentistry, Minn. Rules, Chapter 3100.

**ORDER ON REVIEW OF RULES
UNDER MINNESOTA STATUTES,
SECTION 14.26**

The Minnesota Board of Dentistry ("Agency") is seeking review and approval of the above-entitled rules, which were adopted by the Agency pursuant to Minn. Stat. § 14.26. On June 30, 2010, the Office of Administrative Hearings received the documents that must be filed by the Agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400.
3. The record for the adopted rules demonstrates a rational basis for the need and reasonableness of the proposed rules, with the following exceptions:

Rule Part 3100.0100, subparts 9b, 12a, 12b, 13a, and 14a. Portions of the proposed language of definitions do not constitute definitions of the terms identified. Corrective language is recommended in the attached memorandum.

Rule Part 3100.3600, subpart 9b.B.1. and 2. These items require that forms issued by the Board have information that is not listed in the rule. The information is not generally described in the rule. The rule language is not consistent with the reasons provided for adopting the rule. Corrective language is recommended in the attached memorandum.

Rule Part 3100.8500, subpart 1a.O. This items identifies noninvasive instrumentation as “including, but not limited to” a list of items. This phrase suggests that known items are part of this rule but are not being made known to the regulated public. The rule language fails to reflect the intent of the Agency. Corrective language is recommended in the attached memorandum.

Rule Part 3100.8700, subpart 2.C. and 3100.8700, subpart 2.C. These items identify noninvasive instrumentation as “including, but not limited to” a list of items. This phrase suggests that known items are part of this rule but are not being made known to the regulated public. The information is not generally described in the rule. The rule language fails to reflect the intent of the Agency. Corrective language is recommended in the attached memorandum.

4. The foregoing identified provisions of the adopted rules are **DISAPPROVED** as not meeting the requirement that rules be needed and reasonable. All other rule parts are approved.

Dated this 14th day of July, 2010.

/s/ Manuel J. Cervantes

MANUEL J. CERVANTES
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, Section 14.26, the agency has submitted these rules to the Administrative Law Judge (“ALJ”) for a review of their legality. The rules identified below are disapproved as not meeting the legal standards for adopted rules. Corrective language is proposed. All other rule parts are approved.

Rule Part 3100.0100, subparts 9b, 12a, 12b, 13a, and 14a.

Subparts 9b, 12a, 12b, 13a, and 14a of rule part 3100.0100 define various terms. Portions of the proposed language of these definitions are not grammatically connected to the definitional language to make the whole of each subpart a definition of the term identified.

For example, subpart 9b defines deep sedation as follows:

Subp. 9b. Deep sedation. “Deep sedation” means a depressed level of consciousness produced by a pharmacological or

nonpharmacological method or a combination thereof during which patients cannot be easily aroused but respond purposefully following repeated or painful stimulation. The ability to independently maintain ventilatory function may be impaired. Patients may require assistance in maintaining a patent airway, and spontaneous ventilation may be inadequate. Cardiovascular function is usually maintained.

The last three sentences of the subpart are declarative in nature and do not assist in defining the term. To accomplish this goal, the ALJ suggests modifying the last three sentences of the subpart to read:

Deep sedation is characterized by impairment of the patient's ability to independently maintain ventilatory function, spontaneous ventilation potentially being inadequate to meet a patient's needs, and the need for assistance in maintaining a patent airway. A patient's cardiovascular function does not typically require assistance during deep sedation.

Subpart 12a defines General Anesthesia and suffers similar language defects. The ALJ suggests replacing the last three sentences of the subpart with the following:

General Anesthesia is characterized by the frequent impairment of the patient's ability to independently maintain ventilatory function, the patient's need for assistance in maintaining a patent airway, the need for positive pressure ventilation due to depressed spontaneous ventilation or drug-induced depression of neuromuscular function, and potential impairment of cardiovascular function.

Subpart 12b defines Hospital and suffers a similar language defect in the last sentence. The ALJ suggests replacing the last sentence of the subpart with the following:

For the purposes of these rules, diagnostic or treatment centers, physicians' offices or clinics, or dentists' offices or clinics are not hospitals.

Subpart 13a defines minimal sedation and suffers similar language defects. The ALJ suggests replacing the last two sentences of the subpart with the following:

Minimal sedation is characterized by moderate impairment to the patient's cognitive function and coordination, but leaves unaffected the patient's ventilatory and cardiovascular functions.

Subpart 14a defines moderate sedation and suffers similar language defects. The ALJ suggests replacing the last two sentences of the subpart with the following:

Moderate sedation is characterized by unaffected cardiovascular functions, no need for intervention to maintain a patent airway for the patient, and adequate spontaneous ventilation.

In each of the foregoing suggestions, the language incorporates the proposed rule language into the definition to accomplish the goal set out in the Agency SONAR. The new language is not substantially different from that initially proposed by the Agency.

Rule Part 3100.3600, subpart 9b.B.1. and 2.

Subparts 9b.B.1. and 2 of Rule Part 3100.3600 require that forms issued by the Board have information that is not listed in the rule. The information is not generally described in the rule. Thus there is no check on the Agency's discretion to require information that is not relevant to the purposes for which the information is sought. To address this unfettered discretion and lack of description, the ALJ suggests replacing the language with the following:

A completed application form will provide information on the employed or contracted licensed health professional, office facilities, emergency protocols, monitoring equipment, record-keeping procedures, and other information reasonably needed by the board to assess the certificate application.

The suggested language incorporates the proposed rule language into the rule in a manner that accomplishes the goal set out in the Agency SONAR, without affording unfettered discretion to the Agency. The new language is not substantially different from that initially proposed by the Agency.

Rule Part 3100.3600, subpart 9b.B.2. also has the termination defect described above and should have "Absent a timely renewal," added to the final sentence of the item.

Rule Part 3100.8500, subpart 1a.O. and 3100.8700, subpart 2.C.

Both Rule Part 3100.8500, subpart 1a.O. and 3100.8700, subpart 2.C. purport to identify noninvasive instrumentation as "including, but not limited to" a list of items. This phrase suggests that known items are part of this rule but are not being made known to the regulated public. Since the type of monitoring (by "noninvasive instrumentation") is part of the rule, replacing the "including, but not limited to" phrase with "such as" is sufficient to ensure the Agency's ability to enforce these rules without challenge. The suggested language incorporates the proposed rule language into the items in a manner that accomplishes the goal set out in the Agency SONAR. The new language is not substantially different from that initially proposed by the Agency.

M.J.C.